

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
September 21, 2009 Session

**LARRY BAIN v. TRW, INC. ET AL.**

**Direct Appeal from the Criminal Court for Wilson County  
No. 04-0467 Clara Byrd, Judge**

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**No. M2008-02311-WC-R3-WC - Mailed - March 15, 2010  
Filed - April 15, 2010**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law. An employee sustained a work-related repetitive exposure hearing loss injury. After he retired for reasons unrelated to the injury, he filed suit in the Criminal Court for Wilson County seeking workers' compensation benefits. Following a bench trial, the trial court awarded 65% permanent partial disability to the hearing of both ears and set the date of injury as the date that the employee first learned of his hearing loss. The employer appealed arguing that the award was excessive and that the trial court erred in setting the date of injury. We find that the award was excessive and modify it to 15% permanent partial disability to the hearing of both ears. We have also determined that the trial court erred with regard to its determination of the date of the injury.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Criminal Court Modified**

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which JON KERRY BLACKWOOD and DONALD P. HARRIS, SR. JJ., joined.

Richard Lane Moore, Cookeville, Tennessee, for the appellants, TRW, Inc., TRW Automotive U.S., LLC, and American Home Assurance Company.

Hugh Green and John Meadows, Lebanon, Tennessee, for the appellee, Larry Bain.

**MEMORANDUM OPINION**

## I.

Larry Bain was employed by TRW, Inc., from 1968 until he retired in March 2006.<sup>1</sup> TRW manufactures automotive gears. In February 2002, TRW instituted a hearing protection program. After that time, Mr. Bain and the other TRW employees were provided with their choice of earplugs or other hearing protection devices and were required to wear these devices while in the production areas of the plant. Mr. Bain testified that he used earplugs at all times from and after February 2002.

In February 2004, Mr. Bain filed a complaint in the Criminal Court for Wilson County. He alleged that he had sustained permanent hearing loss as a result of exposure to noise in the workplace. Dr. Scott Fortune examined Mr. Bain in October 2004 and diagnosed him with noise-related hearing loss.<sup>2</sup> Dr. Fortune opined that Mr. Bain retained a binaural hearing impairment of 18.1% and that the largest portion of his hearing loss was in the higher frequencies. Mr. Bain's "speech discrimination score" was 92% in the right ear and 88% in the left ear. Dr. Fortune later testified that persons with high-frequency hearing loss typically had difficulty understanding speech in the presence of background noise, such as in restaurants. He also testified that noise-induced hearing loss did not worsen after exposure to the noise was ended, either by removal of the source of the noise or by use of adequate hearing protection. He did not recommend any restrictions or limitations upon Mr. Bain's activities.

Dr. David Haynes, an otologist, examined Mr. Bain in January 2005. Dr. Haynes's diagnosis was the same as Dr. Fortune's. Based upon testing performed at his request, Dr. Haynes opined that Mr. Bain retained a binaural hearing impairment of 12.8%. He reviewed the results of an audiogram administered in August 2002, and opined that Mr. Bain had a 2.8% binaural hearing impairment at that time. He agreed with Dr. Fortune that noise-induced hearing loss does not worsen after exposure to noise ends. On cross-examination, he estimated that approximately 80% of Mr. Bain's hearing loss was caused by exposure to noise.

Dr. David Lipscomb, a consulting audiologist<sup>3</sup> retained by TRW, tested the noise levels throughout TRW's plant. He testified that the OSHA standard for permissible noise exposure was 85 decibels and that prolonged exposure to noise below that level was

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<sup>1</sup>Mr. Bain's retirement from TRW was not related to the hearing loss that is at issue on this appeal.

<sup>2</sup>Mr. Bain also reported occasional episodes of tinnitus. These were considered to be minor, and no impairment was assigned for that condition.

<sup>3</sup>A non-physician specializing in the science of hearing and hearing loss.

considered to be safe. Dr. Lipscomb discussed the types of hearing protection which TRW provided to its employees. He stated that these were generally rated to provide 27 decibels or more of noise reduction, and would be expected to provide, at a minimum, 10 decibels of noise reduction. Based upon his measurements of noise in the plant, Dr. Lipscomb opined that an employee who wore the earplugs provided by TRW after 2002, would have been exposed to less than 85 decibels and would have sustained no additional work-related hearing loss after that date. On cross-examination, Dr. Lipscomb agreed that one of the measurements taken at TRW's facility showed "impulses" of noise in excess of 100 decibels. He did not consider these to be harmful. He stated that OSHA regulations permitted exposures of this type up to 140 decibels, rather than the 85 decibels permitted for sustained background noise.

Dr. Ken Stockdell, another audiologist retained by TRW, testified that he had conducted hearing tests of TRW's workers, including Mr. Bain, from 1982 until 2006. He testified that the results of Mr. Bain's tests showed a gradual decline over time. He described the method and equipment used to conduct the tests. He testified about the specific results of the August 2002 test which was the first test given after the hearing protection program was instituted.

Mr. Bain testified that he had attended school into the eighth grade and that he had worked for TRW for thirty-eight years. He stated that he arranged to have an audiogram on his own when he began to notice problems with his hearing in 2003. He also stated that in June 2003, this test confirmed that he had hearing problems and that he reported the results of the test to TRW.

Mr. Bain testified that he often had to ask his wife and other persons who spoke to him to repeat themselves. He also stated that he had difficulty understanding speech in restaurants and other noisy places and that he found it necessary to adjust the volume of his television set to a high level in order to understand it. Mr. Bain estimated his hearing loss at 65%-70%. On cross-examination, he agreed that he had been able to perform his job until he retired and that he had missed no work because of his hearing problems. He also stated that after he retired from TRW in March 2006, he obtained another job at an automobile dealership and that he was able to perform that job without accommodations.

Rodney Caldwell, a vocational evaluator, also testified on behalf of TRW. He opined that, based upon the absence of restrictions from any medical doctor, Mr. Bain had 0% vocational impairment due to his hearing loss.

Following a bench trial, the trial court awarded 65% permanent partial disability of the hearing of both ears, a scheduled member. Tenn. Code Ann. § 50-6-207(3)(A)(ii)(r) (Supp. 2009). The trial court also concluded that the injury occurred on June 13, 2003 – the

date on which Mr. Bain learned the results of the private audiogram. TRW has appealed, raising several issues which may be summarized as follows: The trial court erred (1) by compensating Mr. Bain for hearing loss which occurred after February 2002, (2) by declining to view the video recording of the deposition of Dr. Lipscomb, and (3) by selecting an incorrect injury date for purposes of determining the applicable workers' compensation benefit rate. TRW also asserted that the amount of benefits awarded by the trial court is excessive.

## II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

## III.

TRW contends that the evidence shows that the greater part of Mr. Bain's hearing loss occurred after the hearing protection program was established in February 2002 and, therefore, was not work-related. Drs. Fortune, Haynes and Lipscomb all testified that noise-induced hearing loss does not progress after exposure to loud noise ends. TRW argues that the evidence, including Dr. Lipscomb's testimony and Mr. Bain's own testimony, shows that no injurious exposure to noise occurred after February 2002.

The results of Mr. Bain's August 2002 hearing test, which were the closest in time to the initiation of the hearing protection program, showed an impairment of 2.8%. The test administered by Dr. Fortune, which showed an impairment of 18.1% of Mr. Bain's binaural hearing, occurred in October 2004 – two and one-half years after Mr. Bain began using hearing protection at all times. Likewise, Dr. Haynes's test, which showed an impairment of 12.8%, was not given until January 2005. Based upon those facts, TRW cites *Hix v. TRW*

*Inc.*, No. M2009-02822-WC-R3-WC, 2009 WL 1643448, \*5-6 (Tenn. Workers' Comp. Panel June 12, 2009), which addressed the same hearing protection program, in support of its position that only the portion of Mr. Bain's hearing loss which occurred prior to February 2002 is compensable.

Mr. Bain argues that the August 2002 test was not as reliable as the subsequent tests, because it was administered in a mobile facility which was not as well soundproofed as the doctors' offices where the later tests were administered. He also points out that the testing of noise levels in TRW's plant performed by Dr. Lipscomb showed spikes in noise which exceeded levels for which hearing protection was provided. He also cites the testimony of Dr. Haynes that "80%" of his hearing loss was work-related.

We conclude that *Hix v. TRW, Inc.* dictates the result on this issue. In this case, as in *Hix v. TRW, Inc.*, the clear weight of the medical testimony was that noise-induced hearing loss does not progress after exposure to an injurious level of noise ends. Mr. Bain testified, as did Mr. Hix, that he used earplugs at all times he was working after February 2002. The medical and technical testimony established that the devices used by Mr. Bain reduced the level of noise entering his ear to a level which was not injurious. TRW is, therefore, liable only for the hearing loss sustained before February 2002.

#### IV.

TRW submitted both a video recording and a typed transcript of the evidentiary deposition of Dr. Lipscomb to the trial court. The court read the transcript but declined to view the video recording. This issue was also addressed directly in *Hix v. TRW, Inc.*, 2009 WL 1643448 at \*6. Consistent with the ruling in that case, we decline to hold that the trial court erred by declining to view the video recording of the deposition when it had already read the transcript.

#### V.

The trial court found that the injury occurred on June 13, 2003, the date that Mr. Bain first learned that he had a noise-related hearing loss. TRW contends that the correct date of injury should be based upon the last injurious exposure to noise in the workplace, which occurred in February 2002. TRW concedes that the maximum workers' compensation benefit rate in effect on the date of injury is applicable in this case. The maximum benefit

rate in February 2002 was \$581 per week; the maximum benefit rate in June 2003 was \$599 per week.<sup>4</sup>

This issue was also addressed directly in *Hix v. TRW, Inc.* In that case, the trial court fixed the date of injury on the date that the employee gave notice of his claim to his employer. Mr. Hix contended that the “last day worked” rule should have been applied. *Hix v. TRW, Inc.*, 2009 WL 1643448 at \*6. TRW argued then, as now, for application of the last injurious exposure rule. *Hix v. TRW, Inc.*, 2009 WL 1643448, at \*6. The panel noted that there was “a clear point of last injurious exposure, that no further deterioration related to the workplace injury [occurred] beyond that point, and that the employee’s ability to perform his or her work [did] not cease either temporarily or permanently as a result of a workplace injury.” *Hix v. TRW, Inc.*, 2009 WL 1643448, at \*7. Under those circumstances, the panel found that the correct injury date was the date of the last injurious exposure to harmful noise. *Hix v. TRW, Inc.*, 2009 WL 1643448, at \*8. The same set of circumstances is present in this case. We conclude, therefore, that the correct date of injury in this case is February 1, 2002.

## VI.

Finally, TRW contends that the evidence at trial preponderates against the trial court’s award of 65% permanent partial disability of the hearing of both ears. In addition to Mr. Caldwell’s testimony and its arguments concerning post-2002 changes, TRW notes that Mr. Bain missed no work as a result of his hearing loss, was able to perform all of his job duties adequately without any accommodations, worked a substantial amount of overtime until his voluntary retirement, and was able to obtain another job shortly after his retirement. On the basis of those facts, it compares this case to *Hix v. TRW, Inc.*, and *Crowell v. TRW, Inc.*, No. M2007-2758-WC-R3-WC, 2009 WL 1260319 (Tenn. Workers’ Comp. Panel May 8, 2009), in which previous panels substantially reduced the trial courts’ awards. Mr. Bain emphasizes his own testimony concerning the amount of his hearing loss, and the testimony of the medical doctors that his loss was quite significant in the higher frequencies.

Mr. Bain’s hearing loss did not limit his ability to perform his job for TRW, nor did it cause him to leave his employment. It did not impair his ability to obtain employment after his retirement, or interfere with his ability to perform the duties of his subsequent job. The only vocational evidence presented, the testimony of Mr. Caldwell, is consistent with a minimal vocational disability. We conclude that the award of 65% permanent partial disability was excessive, and find that Mr. Bain has sustained a 15% permanent partial disability of his hearing.

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<sup>4</sup>Tenn. Dep’t of Labor and Workforce Dev., *Benefit Rate Table*, available at <http://www.tn.gov/labor-wfd/WCRATETB.pdf>.

**VII.**

The judgment is modified to award 15% permanent partial disability of the hearing of both ears, at a workers' compensation benefit rate of \$581 per week. It is affirmed in all other respects. Costs are taxed one-half to TRW, Inc., TRW Automotive U.S., LLC, and American Home Assurance Company, and their surety, and one-half to Larry Bain, for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUSTICE

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**No. M2008-02311-WC-R3-WC - Filed - April 15, 2010**

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**JUDGMENT**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid one-half to TRW, Inc., TRW Automotive U.S., LLC, and American Home Assurance Company, and their surety, and one-half to Larry Bain, for which execution may issue if necessary.

PER CURIAM